



Escrow Agreement (Shares in Escrow)

Document 1408A

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ESCROW AGREEMENT

This ESCROW AGREEMENT, dated as of [DATE] (the “**Escrow Agreement**”), is by and between [COMPANY NAME], a _____ [corporation] and [LIST STOCKHOLDERS] (collectively referred to herein as the “**Sellers**”), [COMPANY NAME], a _____ corporation (the “**Purchaser**”), and _____, as escrow agent (the “**Escrow Agent**”).

WHEREAS, the Purchaser and the Sellers have entered into a [NAME OF AGREEMENT] dated as of [DATE] (as amended and in effect from time to time, the “**Agreement**”), pursuant to which the Purchaser will acquire all of the assets of the Sellers [and all of the stock of COMPANY NAME], upon the terms and subject to the conditions set forth in the Agreement;

WHEREAS, entering into this Escrow Agreement is a condition to the effectiveness of Purchaser’s obligation to consummate the transactions contemplated in the Agreement;

WHEREAS, the Sellers have agreed to deposit shares of common stock, par value \$____ per share of the Company into an escrow account pending resolution of issues that may arise under the Agreement; and

WHEREAS, the Purchaser and the Sellers desire to appoint the Escrow Agent to act as escrow agent hereunder in the manner hereinafter set forth, and the Escrow Agent is willing to act in such capacity.

NOW THEREFORE, in consideration of the covenants and agreements herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. Definitions. Capitalized terms used herein and not defined herein shall have the meanings set forth in the Agreement (attached hereto as Exhibit A).

2. Deposit of Escrow Shares. Pursuant to Section __ of the Agreement, (a) the Purchaser hereby deliver to the Escrow Agent a stock certificate representing [NUMBER (___)] shares of the Company’s common stock (the “**Deposit Shares**”) and (b) [STOCKHOLDER’S REPRESENTATION] hereby deliver to the Escrow Agent stock transfer powers, duly executed in blank, in respect of the Deposit Shares. The Deposit Shares, together with (1) all shares of capital stock of the Company issued or distributed in connection with any dividend or distribution on, or redemption, stock split or other recapitalization of, any Deposit Share and (2) all securities and other property issued or distributed in respect of any Deposit Share in connection with any merger, consolidation, liquidation or dissolution of the Company, or otherwise involved in the distribution of all or substantially all of the assets of the Company, are referred to collectively as the “**Escrow Shares**”.

3. Acceptance by Escrow Agent; Ownership of Escrow Shares. The Escrow Agent hereby (a) acknowledges receipt of the Escrow Shares, (b) agrees to act as escrow agent in

accordance with the terms and conditions hereof and (c) agrees to hold the Escrow Shares in a separate account (the “**Escrow Account**”) and to distribute the Escrow Shares in accordance with the terms and conditions hereof. The Escrow Agent is serving solely as escrow holder and does not, and will not, own or have any interest in the Escrow Account or the Escrow Shares, having only possession of the Escrow Shares and agreeing to hold and distribute the Escrow Shares in accordance with the terms and conditions hereinafter set forth. The parties intend that the escrow fund created pursuant to this Escrow Agreement be treated for tax purposes as a grantor trust to which the Sellers have transferred the Escrow Shares. Accordingly, the parties agree that for tax purposes they will treat the Sellers as the owners of the Escrow Shares. The purpose of the Escrow Account is to provide a source from which Losses incurred by the Buyer Indemnified Parties can be paid. The Purchaser has a security interest in the Escrow Shares and the Escrow Shares shall not be subject to any security interest, lien or attachment of any creditor of any party other than the Purchaser or a successor to such party’s rights hereunder.

4. Rights of Sellers with Respect to Escrow Shares. At all times during the term of this Agreement, the Sellers shall be the record owners of the Escrow Shares held by the Escrow Agent for such Sellers’ account and shall be entitled to vote such Escrow Shares and to receive any dividends or distributions thereon (other than dividends or distributions constituting Escrow Shares, which shall be delivered to the Escrow Agent and held as Escrow Shares).

5. Disposition of Escrow Shares.

5.1 Disposition of Escrow Shares. The Escrow Shares shall be held by the Escrow Agent until released or surrendered to Purchaser or the Sellers, as the case may be, in accordance with the provisions of this Section 5 (Disposition of Escrow Shares), and each Sellers agrees to execute and deliver such certificates, instruments and instructions to the Escrow Agent as the Purchaser or the Escrow Agent may reasonably request to give effect to such provisions.

5.2 Release of Escrow Shares. The Escrow Agent shall be entitled to release Escrow Shares from time to time as follows:

5.2.1 *Mutual Direction.* Upon receipt by the Escrow Agent of a written notice substantially in the form of Exhibit B signed by Purchaser on its own behalf or on behalf of any Buyer Indemnified Party and by the Sellers (a “**Mutual Direction**”), the Escrow Agent may release the Escrow Shares specified in such memorandum to Purchaser in satisfaction of any claim for indemnification by such Buyer Indemnified Party.

5.2.2 *Payment Notice.* After receipt by the Escrow Agent of a written notice substantially in the form of Exhibit C hereto (a “**Payment Notice**”), signed by Purchaser on its own behalf or on behalf of any Buyer Indemnified Party and delivered to the Sellers relating to a claim arising under Section ___ of the Agreement, if the Sellers shall have failed to object to such Payment Notice by delivery of a written notice substantially in the form of Exhibit D hereto (a “**Protest Notice**”) to the Purchaser and the Escrow Agent prior to [TIME] (Eastern Standard Time) on the fifteenth (15) day after delivery of such Payment Notice (the “**Section 5.2.2 Protest Deadline**”), the Escrow Agent shall deliver to Purchaser the Escrow Shares or the portion thereof specified in such Payment Notice. If the Escrow Agent shall have received a

Protest Notice from either of the Sellers prior to the Section 5.2.2 Protest Deadline, then the Escrow Agent shall not deliver any Escrow Shares to the Purchaser pursuant to this Section 5.2.2 in connection with such written request.

5.2.3 Protest Deadline. After receipt by the Escrow Agent of a Payment Notice, signed by Purchaser on its own behalf or on behalf of any Buyer Indemnified Party and delivered to the Sellers, relating to a claim arising under Section ___ of the Agreement, if the Sellers shall have failed to object to such Payment Notice by delivery of a Protest Notice to the Purchaser and the Escrow Agent prior to [TIME] (E.S.T.) on the forty-fifth (45th) day after delivery of such Payment Notice (the “**Section 5.2.3 Protest Deadline**”), the Escrow Agent shall deliver to Purchaser the Escrow Shares or the portion thereof specified in such Payment Notice. If the Escrow Agent shall have received a Protest Notice from either of the Sellers prior to the Section 5.2.2 Protest Deadline, then the Escrow Agent shall not deliver any Escrow Shares to the Purchaser pursuant to this Section 5.2.2 (Payment Notice) in connection with such written request.

5.2.4 Release of Remaining Shares. Any Escrow Shares that have not been used to pay Losses of any Buyer Indemnified Party shall not be released from escrow until the later of (i) [DATE] and (ii) the resolution of any claim for indemnification which is pending on [DATE]; provided, however, that the Escrow Agent shall not release such remaining Escrow Shares until the Escrow Agent has received a written notice in substantially the form of Exhibit E hereto (an “**Expiration Notice**”) signed by each of the Purchase and each of the Sellers. Promptly thereafter, the Escrow Agent shall deliver to the Sellers the Escrow Shares specified in such Expiration Notice at the address set forth on Schedule I.

5.3 Fair Market Value. Notwithstanding any other provision of this Agreement, if any Escrow Share is to be released by the Escrow Agent to satisfy a claim for Losses brought by any Buyer Indemnified Party in accordance with the terms of the Agreement and Section 5.2 (Release of Escrow Shares), then (i) the fair market value of such Escrow Share shall be determined in accordance with Section ___ of the Agreement and (ii) such Escrow Share shall be delivered to Purchaser for cancellation. Upon such surrender to, and cancellation by, Purchaser of any Escrow Share in accordance with the terms hereof, the claim of such Buyer Indemnified Party to which such canceled Escrow Share relates shall be deemed to have been satisfied to the extent of the value of such Escrow Share as determined in accordance with Section ___ of the Agreement.

6. Percentage Interests; Transfers and Disbursements.

6.1. Escrow Shares; Percentage Interests. Attached hereto as Schedule I is a list of the name, address and federal tax identification number of, and the percentage interest in the Escrow Shares (the “**Percentage Interests**”) attributable to each of the Sellers. A Percentage Interest may only be transferred to the successors or heirs of the Sellers and in accordance with the terms of the Stockholders’ Agreement; said transfer to be effectuated by such successors or heirs by providing the Escrow Agent with such instruments of transfer and other documents as the Escrow Agent may reasonably require. Other than as provided above, neither of the Sellers shall transfer, pledge or otherwise dispose of all or any part of their Percentage Interest and the

Escrow Agent shall have no authority to alter its records to reflect any purported transfer of a Percentage Interest or to make any payment under this Escrow Agreement to any such purported transferee.

6.2. The Escrow Agent shall maintain, on a current basis, the name, address and Percentage Interest of the Sellers and their successors or heirs, as updated from time to time in accordance with Section 6.1 (Escrow Shares; Percentage Interests). A copy of this Agreement shall be provided by the Escrow Agent to each successor and heir promptly upon such person acquiring a Percentage Interest in accordance with Section 6.1 (Escrow Shares; Percentage Interests)..

6.3. Whenever this Agreement requires the release of Escrow Shares to the Sellers or their successors or heirs, the Escrow Agent shall make such payment in accordance with each of their respective Percentage Interests.

7. Escrow Agent.

7.1. Duties of Escrow Agent. Except as expressly set forth herein, the Escrow Agent shall not have any duty or responsibility, including, without limitation, any duty to review or interpret the Agreement. The Escrow Agent shall not have any duty to any person, other than the parties to this Agreement. Except for this Agreement, the Escrow Agent is not a party to, or bound by, any agreement that may be required under, evidenced by, or arise out of, the Agreement.

7.2. Third Party Instructions. If the Escrow Agent shall be uncertain as to its duties or rights hereunder or shall receive instructions from any of the other parties with respect to the Escrow Shares, which, in its opinion, are in conflict with any provision of this Agreement, then the Escrow Agent, at its option after reasonable investigation, shall be entitled to refrain from taking any action until it shall be directed otherwise in writing by (a) each of the Purchasers and the Sellers or (b) order of a court of competent jurisdiction. The Escrow Agent shall be protected in acting upon any notice, request, waiver, consent, receipt or other document reasonably believed by the Escrow Agent to be signed by the proper party or parties.

7.3. No Liability of Escrow Agent. The Escrow Agent shall not be liable for any error in judgment or for any act taken or omitted by it in good faith or for any mistake of fact or law, or for anything that it may do or refrain from doing in connection herewith, except for such acts and omissions which constitute negligence, malfeasance or willful misconduct.

7.4. Dispute Resolution. In the event of any disagreement between any of the parties or any of the parties and any other person resulting in any conflicting or adverse claim or demand being made in connection with or for any Escrow Shares, the Escrow Agent, at its option, shall be entitled to refuse to comply with such claim or demand so long as such disagreement shall continue, and in so doing the Escrow Agent shall not be or become liable for damages or interest to any of the parties or any other person named herein for its failure or refusal to comply with such conflicting or adverse claim or demand. The Escrow Agent shall be entitled to continue so to refrain and refuse so to act until all differences shall have been resolved

by agreement and the Escrow Agent shall have been notified thereof in writing signed by each of the Purchaser and each of the Sellers. In the event of any such disagreement which continues for sixty (60) days or more, the Escrow Agent, in its discretion, may, if the Escrow Agent determines it to be required by the circumstances, file a suit in interpleader for the purpose of having the respective rights of the claimants adjudicated and may deposit with the court all documents and property held hereunder.

7.5 Indemnification of Escrow Agent. The Purchaser and the Sellers agree, jointly and severally (with a right of 50% net contribution as between the Purchaser and the Sellers) to indemnify the Escrow Agent for, and to defend and hold harmless the Escrow Agent from and against, any and every loss, liability, damage, claim, cost and expense of any nature incurred or suffered by the Escrow Agent and arising out of or in connection with this Agreement or the administration of this Agreement or the performance or observance by the Escrow Agent of its responsibilities or services under this Agreement (including, but not limited to, attorneys fees and other costs and expenses of defending or preparing to defend against any claim or liability), unless and except to the extent such loss, liability, damage, cost or expense shall be caused by the Escrow Agent's own negligence, malfeasance or willful misconduct; provided, however, that nothing in this Section 7.5 (Indemnification of Escrow Agent) is intended or shall be construed to limit any party's ability to seek indemnification for such costs and expenses to the extent, if any, that such costs and expenses are indemnifiable pursuant to Section ____ of the Agreement. The provisions of this Section 7.5 (Indemnification of Escrow Agent) shall survive the termination of this Agreement.

7.6 Resignation of Escrow Agent. The Escrow Agent (and any successor Escrow Agent) may at any time resign as such by delivering the Escrow Shares and related stock powers to (i) any banking corporation or trust company organized under the laws of the United States of America or of any state thereof which (A) is jointly designated by each of the Purchaser and the Sellers in writing as successor escrow agent and (B) consents in writing to act as successor escrow agent or (ii) any court of competent jurisdiction, whereupon the Escrow Agent shall be discharged of and from any and all further obligations arising in connection with this Agreement. The resignation of the Escrow Agent will take effect on the earlier of (1) the date of appointment of a successor escrow agent by designation by each of the Purchaser and the Sellers and delivery of the Escrow Shares to such successor escrow agent (or delivery of the Escrow Shares to any court of competent jurisdiction) or (2) the date that is sixty (60) days after the date of delivery of its written notice of resignation to the other parties. If at that time the Escrow Agent has not received a designation of a successor escrow agent, the Escrow Agent's sole responsibility after that time shall be for the safekeeping of the Escrow Shares until receipt of a designation of successor escrow agent, or a joint written instruction executed by each of the Purchaser and the Sellers as to disposition of the Escrow Shares, or a final order of a court of competent jurisdiction mandating disposition of the Escrow Shares.

7.7 Compensation of Escrow Agent. The Escrow Agent shall be paid in full for its services hereunder the compensation set forth on Schedule II hereto, 50% of which shall be borne by the Purchaser and 50% of which shall be borne by the Sellers. The Escrow Agent shall be reimbursed upon demand for all other out-of-pocket expenses, including, without limitation,

reasonable attorneys' fees, which shall be paid 50% by the Purchaser and 50% by the Sellers. In the event of any dispute hereunder, the Escrow Agent may consult with counsel of its own choice and shall be entitled to reimbursement upon demand for its expenses, including, without limitation, out-of-pocket expenses and reasonable attorneys' fees, 50% of which shall be borne by the Purchaser and 50% of which shall be borne by the Sellers; provided, however, that nothing in this Section 7.7 (Compensation of Escrow Agent) intended or shall be construed to limit any party's ability to seek indemnification for such costs and expenses to the extent, if any, that such costs and expenses are indemnifiable pursuant to Section __ of the Agreement.

8. Miscellaneous Provisions.

8.1 No Assignment. Neither this Agreement nor any rights or obligations hereunder may be transferred or assigned without the other party's prior written consent and any attempt to the contrary shall be void.

8.2 Termination. This Agreement shall automatically terminate upon the final distribution of the Escrow Shares in accordance with the terms hereof.

8.3 Governing Law. This Agreement will be construed in accordance with and governed by the laws of the [____], without giving effect to the conflict of law principles of the [____].

8.4 Successors and Assigns. Except as otherwise expressly provided in this Agreement, this Agreement will be binding on, and will inure to the benefit of, the successors and permitted assigns of the parties to this Agreement. Nothing in this Agreement is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights or obligations under or by reason of this Agreement, except as expressly provided in this Agreement.

8.4 Notices. All notices and other communications required or permitted hereunder will be in writing and will be delivered by hand or sent by overnight courier, fax or e-mail to:

if to Company:

fax: _____

e-mail: _____

Attention: _____

with a copy to:

fax: _____

e-mail: _____
Attention: _____

if to Sellers:

fax: _____
e-mail: _____
Attention: _____

with a copy to:

fax: _____
e-mail: _____
Attention: _____

if to Purchaser:

fax: _____
e-mail: _____
Attention: _____

with a copy to:

fax: _____
e-mail: _____
Attention: _____

if to Escrow Agent:

fax: _____
e-mail: _____
Attention: _____

Each party may furnish an address substituting for the address given above by giving notice to the other parties in the manner prescribed by this Section 8.4 (Notices). All notices and other communications will be deemed to have been given upon actual receipt by (or tender to and rejection by) the intended recipient or any other person at the specified address of the intended recipient.

8.5 Severability. In the event that any provision of this Agreement is held to be unenforceable under applicable law, this Agreement will continue in full force and effect without such provision and will be enforceable in accordance with its terms.

8.6 Waiver. No waiver of any provision hereof shall be effective unless made in writing and signed by the waiving party. The failure of any party to require the performance of any term or obligation of this Agreement, or the waiver by any party of any breach of this Agreement, shall not prevent any subsequent enforcement of such term or obligation or be deemed a waiver of any subsequent breach.

8.7 Successors. This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns; provided, however, that this Agreement may not be assigned by any party without the prior written consent of the other parties, which consent shall not be unreasonably withheld; and provided, further, that the Purchaser may assign all or any of its rights and obligations hereunder to any of its Affiliates without the consent of any party so long as such Purchaser guarantees the obligations of such Affiliate.

8.8 Construction. The titles of the sections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement. Unless the context of this Agreement clearly requires otherwise: (a) references to the plural include the singular, the singular the plural, and the part the whole, (b) references to one gender include all genders, (c) “or” has the inclusive meaning frequently identified with the phrase “and/or,” (d) “including” has the inclusive meaning frequently identified with the phrase “including but not limited to” or “including without limitation,” and (e) references to “hereunder,” “herein” or “hereof” relate to this Agreement as a whole. Any reference in this Agreement to any statute, rule, regulation or agreement, including this Agreement, shall be deemed to include such statute, rule, regulation or agreement as it may be modified, varied, amended or supplemented from time to time.

8.9 Entire Agreement. This Agreement embodies the entire agreement and understanding between the parties hereto with respect to the subject matter of this Agreement and supersedes all prior or contemporaneous agreements and understandings other than this Agreement relating to the subject matter hereof.

8.10 Amendments. This Agreement may not be amended or modified at any time except in such manner as may be agreed upon by a written instrument executed by each of the Purchaser, the Sellers and the Escrow Agent (or any successor escrow agent designated in accordance with the provisions of Section 7.6 (Resignation of Escrow Agent)).

8.11 Counterparts. This Agreement may be in any number of counterparts, each of which will be deemed an original, but all of which together will constitute one instrument.

[The remainder of this page has been intentionally left blank.]

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first written above.

PURCHASER:

[COMPANY NAME]

By _____
Its:

SELLERS:

[STOCKHOLDER NAME]

[STOCKHOLDER NAME]

ESCROW AGENT:

[ESCROW AGENT NAME]

By _____
Its:

SCHEDULE I

PERCENTAGE INTERESTS

Name and Address of Sellers	Federal Tax Id or Social Security Number	Percentage Interest

SCHEDULE II

ESCROW AGENT'S FEE

PURCHASE AGREEMENT

MUTUAL DIRECTION

[DATE]

[ESCROW AGENT
[ESCROW ADDRESS]]

Ladies and Gentlemen:

This Mutual Direction is delivered to you pursuant to Section 5.2.1 of the Escrow Agreement dated as of _____ by and among [LIST PARTIES] (together, the “**Sellers**”), [LIST PARTIES] (the “**Purchaser**”), and _____, as escrow agent (the “**Escrow Agreement**”). Unless otherwise defined herein, terms used herein without definition shall have the meanings provided in the Escrow Agreement.

The undersigned hereby instruct you to release [_____] Escrow Shares from the Escrow Account to Purchaser as soon as practicable.

Very truly yours,

[COMPANY NAME]

By: _____
Name:
Title:

[Stockholder name]

[Stockholder name]

FORM OF PAYMENT NOTICE

[DATE]

[ESCROW AGENT]

[ESCROW ADDRESS]

Ladies and Gentlemen:

This Payment Notice is delivered to you pursuant to Sections 5.2.2 and 5.2.3 of the Escrow Agreement dated as of [DATE] by and among [LIST PARTIES] (together, the “**Sellers**”), [LIST PARTIES] (the “**Purchaser**”), and _____, as escrow agent (the “**Escrow Agreement**”). Unless otherwise defined herein, terms used herein without definition shall have the meanings provided in the Escrow Agreement.

Under Section ____ of the Agreement, the Sellers have certain obligations to indemnify Buyer Indemnified Parties (as defined therein). Attached hereto for the sole benefit of the Sellers is a Schedule setting forth one or more claims by a Buyer Indemnified Party under such Section ____, the dollar amount of each such claim, the number of Escrow Shares necessary to satisfy such claim and, if applicable, the manner in which the Sellers has satisfied each such claim.

The undersigned hereby instruct you to release [_____] Escrow Shares from the Escrow Account to Purchaser as soon as practicable after [TIME] (Eastern Standard Time) on _____ [the 15th/45th business day after Purchaser delivers this Payment Notice]; provided, however, that if Sellers delivers a Protest Notice to you prior to [TIME] (Eastern Standard Time) on _____ [the 15th/45th business day after Purchaser delivers this Payment Notice], you shall not distribute the Escrow Funds or the portion thereof as directed in this Payment Notice.

Very truly yours,

[COMPANY NAME]

By: _____

Name:

Title:

cc: Stockholders

PROTEST NOTICE

[DATE]

[ESCROW AGENT
[ESCROW ADDRESS]]

Ladies and Gentlemen:

This Protest Notice is delivered to you and the Purchaser pursuant to Section 5 of the Escrow Agreement dated as of _____ by and among [LIST PARTIES] (together, the “**Sellers**”), [LIST PARTIES] (the “**Purchaser**”), and _____, as escrow agent (the “**Escrow Agreement**”). Unless otherwise defined herein, terms used herein without definition shall have the meanings provided in the Escrow Agreement.

The undersigned hereby protests the Payment Notice of the Purchaser dated [DATE] and directs you not to release any Escrow Shares from the Escrow Account pursuant to such Payment Notice until you receive notice that such dispute has been resolved in accordance with the terms of the Escrow Agreement.

Very truly yours,

[Name of Sellers]

cc: Purchaser

EXPIRATION NOTICE

[DATE]

[ESCROW AGENT
[ESCROW ADDRESS]]

Ladies and Gentlemen:

This Expiration Notice is delivered to pursuant to Section 5 of the Escrow Agreement dated as of _____ by and among [LIST PARTIES] (together, the “**Sellers**”), [LIST PARTIES] (the “**Purchaser**”), and _____, as escrow agent (the “**Escrow Agreement**”). Unless otherwise defined herein, terms used herein without definition shall have the meanings provided in the Escrow Agreement.

On the date hereof, _____ Escrow Shares are held in the Escrow Account and Purchaser has asserted no claims against the Escrow Shares which remain unresolved.

The undersigned hereby direct you to distribute to each of [STOCKHOLDERS] Escrow Shares as soon as practicable.

Very truly yours,

[COMPANY NAME]

By: _____

Name:

Title:

[STOCKHOLDER]

[STOCKHOLDER]